SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 127

WILLIAM MONKS,

Petitioner,

vs.

NEW JERSEY,

Respondent.

On Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

Preliminary Statement

This court granted *certiorari* to review the judgment of affirmance by the Superior Court of New Jersey, Appellate Divison, of an adjudication of delinquency entered against petitioner, William Monks, then age 15, on December 11, 1957, and the sentence later clarified on May 2, 1958, to a life term under an amended statute, by the Passaic County Juvenile and Domestic Relations Court. —— U. S. ——, 23 L. Ed. 2d 216 (1969).

The adjudication of delinquency followed a trial on two petitions, charging petitioner with (1) the commission of an assault and robbery in Paterson on November 12, 1956, by striking Giovanna Giambra with a blunt instrument after stealing her purse while walking on the street, resulting in her death (A.3, 218), and (2) atrocious assault and battery and robbery of Nancy Weiss on February 24, 1956, while walking on the street, after stealing her purse and striking her with a blunt instrument, resulting in serious injuries (A.5, 219). N.J.S.A. 2A:4-14.

There was a full trial, petitioner was represented by counsel and a complete record made of the proceedings.

Petitioner was committed to Bordentown Reformatory for an indefinite term and later transferred in 1967 to State Prison where he now is in custody under a life sentence rendered under the statute of 1958. N.J.S.A. 2A:4-37(b)(2) (A218; 223).

Respondent agrees with the form of the statement of the first question presented by petitioner, as well as the constitutional and statutory provisions involved, as well as those parts of the statement of the case set forth by him under A and B. (Petitioner's brief p. 1-13 inc.).

We disagree with petitioner's statement of the second question involved because it was not raised nor presented in the lower state courts and was not set forth on the petition for *certiorari* filed in this court.

Respondent concedes that petitioner's statement of facts is substantially accurate and helpful because of the detailed and almost microscopic analysis of the evidence included in the appendix and the transcripts of the trial.

We differ however with the interpretation by petitioner of the evidence and the inferences from those facts in his

statement of the "Case against Petitioner", especially where the findings of the lower courts are assailed and the credibility of the witnesses are attacked, in direct opposition to the rule that on review those particular questions are to be resolved against petitioner as here, and reliance placed on those findings by this court where there is substantial evidence to support them. *Lisenba* v. *California*, 314 U. S. 219 (1942); *Lyons* v. *Oklahoma*, 322 U. S. 596.

We do not dispute the right of this court on review to make an independent examination of the question whether the confession in each instance was voluntary, as presented by petitioner. *Davis* v. *North Carolina*, 384 U. S. 737, 741-742 (1966).

Accordingly, respondent will present its view of the facts and the fair and legitimate inferences thereof under the argument to be made, instead of a separate prefatory recital of the facts.

Summary of Argument

1. The confessions in this case given on February 26, 1957 by petitioner were clearly given within the permitted limits after applying the "totality of circumstances" test to those confessions. *Johnson* v. *New Jersey*, 384 U. S. 719 (1966).

2. Considering the obvious restrained police questioning caused by the presence of Chester Jarmolowicz, the probation officer designated by the Judge of the Juvenile Court to protect petitioner, age 15, a juvenile from any coercion or misconduct by the police (actual or psychological) during interrogation, and who acted as his guardian and protector, it becomes manifest that the circumstances surrounding the questioning of petitioner in no way suggest coercion of any sort similar to the facts in *Haley* v. *Ohio*, 332 U. S. 596 (1948), relied on by petitioner. On the contrary, the confessions here were the product of an essentially free and unconstrained choice by its maker obtained without force, cajolery or trickery, and at no time was the will of petitioner overborne and his capacity for self-determination critically impaired. *Culombe* v. *Connecticut*, 367 U. S. 568 (1961). The presence of the court appointed probation officer during police interrogation distinguishes significantly this case from all other pre-*Miranda* decisions of this Court as the test to be applied in a case involving a juvenile confession.

3. The classification of petitioner's sentence as a life term on May 2, 1958, after the trial under the amended statute, N.J.S.A. 2A:4-37(b) effective after the date of the original commitment made on December 11, 1957, did not deprive petitioner of due process of law because made in his absence but rendered in the presence of his attorneys, because by the terms of the statute, the later commitment

was a translation of the phrase "delinquent" into the specific offense of first degree murder, and was made solely for the purpose of determining the crime committed and fixing the maximum sentence to be served, as the statute required—a beneficial change from prior law. This declaration did not involve a new finding of fact as claimed by petitioner but was based entirely on the evidence at the trial.

4. Petitioner at the trial defended on a denial of the offense alleged and shown to be a first degree felony murder arising out of a robbery under N.J.S.A. 2A:113-2, and if he claimed the post-trial right to show a lesser degree of murder or diminished responsibility at the time of determining the crime committed and fixing the maximum term of commitment, he would be admitting the offense which would be completely inconsistent with his original claim of denial and therefore detrimental to him.

5. The claim of illegal sentence argued by petitioner here was not raised nor presented in the lower state courts nor set forth on the petition for *certiorari* filed in this court, and for those reasons should not be considered by this court on review. *California* v. *Taylor*, 353 U. S. 553, 556 (1957); *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 428-429 (1964); Rule 40, 1(d)(2) of this court (Rev. 1967).

ARGUMENT.

POINT ONE

The oral and written confessions of petitioner were voluntary because they were the free choice of the maker, not obtained in violation of fundamental fairness, and the admission by the lower courts was based on substantial evidence and should not be disturbed.

Petitioner has asserted that his case is identical with *Haley* v. *Ohio*, 332 U. S. 596 (1948), and his argument starts with the claim that "all of petitioner's confessions following 8 P.M. were plainly involuntary—the extractions of police-applied pressure that overbore petitioner's will". (Petitioner's brief pages 58, 59). He concludes his argument by stating that the conduct and methods pursued by the police during interrogation of petitioner "make Haley's ordeal seem mild by comparison." (Petitioner's brief page 71).

We contend that the argument that petitioner's confession was extracted is untenable, and the application of *Haley* inapposite for reasons to be argued by us.

In *Haley*, the murder confession was obtained after 5 or 6 hours of police questioning, in relays, through the dead of night until about 5 A.M. when he confessed after being shown statements by two confederates who incriminated him. Haley was then confined in jail and held incommunicado for over three days during which time a lawyer retained by his mother was twice refused access to him, and his mother was not permitted to see him until more than five days after his confession.

Clearly, *Haley* has similarity to petitioner's case only because they were both 15 years of age at the time, but

from that point on the facts differ radically because petitioner had present during his interrogation by the Police the probation officer designated by the Judge of the Juvenile court to protect him from any possible abuse or coercion by the police interrogators.

Haley had no one at his side to serve as a restraining influence by the police during his ordeal.

Despite the fact that New Jersey law did not require notification or the actual presence of either the parents or a representative of the juvenile authorities before a juvenile can be questioned (*cf.* New York Family Court Act § 724; *Re: Dennis,* 20 App. Div. 2d 90, 245 N. Y. S. 2d 243 (1963); *Re: Gault,* 387 U. S. 1, 18 L. Ed. 2d 527 at 557, 558), the judge of the Juvenile Court in February 1957 permitted the interrogation of petitioner who was then in custody on unrelated purse snatching charges only in the presence of Mr. Jarmolowicz a probation officer. The probation officer was directed "to see to it that the boy was not abused in any way or taken advantage of or exhausted or placed in a position where he might say something that his physical condition probably would not allow him to say otherwise." (A.13, A.158). This was in accord with long standing proposals for the presence of an impartial observer during interrogation. "Confessions" 79 Harv. L. Rev. 940 (1966).

We contend and will show that the age of petitioner *per se* and the fact that interrogation took place in the presence of the probation officer designated by the Juvenile Court all establish the fact that the intellectual capacity and capability of petitioner to bear the interrogation did not result in having his will broken by the police and the confessions readily obtained by coercion practiced upon him. *Gallegos* v. *Colorado,* 370 U. S. 49 (1962); *People* v. *Lara,* 62 Cal. Rptr. 586, 432 P. 2d 202 (1967);

Annotation: 87 A. L. R. 2d 614; 47 Am. Jur. 2d §50, p. 1024 (1969); 79 Harv. L. Rev. 940 (1966).

Petitioner has realized that his case differs from *Haley* v. *Ohio, supra, Gallegos* v. *Colorado,* 370 U. S. 49, 8 L. Ed. 2d 325 (1962), and *Culombe* v. *Connecticut,* 367 U. S. 568, 6 L. Ed. 2d 1037 (1961) but has claimed similarity even though the order of the Judge of the Juvenile Court permitted interrogation of petitioner only in the presence of the probation officer and the restraining influence it was intended to serve and actually did have on the police.

In the cited cases, relied on by petitioner, the accused had no one to protect him while being interrogated, as appears in the case at bar.

It is a significant fact that the interrogation took place in the Court House and not at a police station, and thus free from the coercive atmosphere of the station house as provided by New Jersey law as to juveniles. See N.J. S.A. 2A:4-33. Also, under New Jersey law, a probation officer is the guardian of a juvenile in the custody of a Juvenile Court and is not a police officer or connected with the police. N.J.S.A. 2A:4-32.

It is apparent that our case differs from the cited decisions because the Juvenile Court here sought to protect the juvenile suspect from coercion, browbeating or other misconduct of the police, by cloaking him with a protector who was a guardian *pro tem* to insulate him from any and all forms of imposition or coercion to insure fair and reasonable interrogation. This is in accordance with the New Jersey statute, N.J.S.A. 2A:4-34 which mandates juveniles under 18 as wards of the court as well as protective practice of a juvenile.

Petitioner has realized this fundamental distinction between the cases cited and our case because he has at con-

siderable length and argument attacked the credibility of the probation officer, Jarmolowicz, in the performance of his duty, in the scope of his protection, and the claimed carelessness of his conduct and testimony, in order to demonstrate that his presence was not and did not curtail or restrain the police in the method of interrogation. (Petitioner's brief p. 46-52 inc., 69).

Monks claims that despite the presence of the probation officer, his confession was coerced, and which respondent contends amounts to an attack on the findings of the State courts to the contrary.

The fact is that both lower courts made express findings that the presence of the probation officer at the side of petitioner during police interrogation was a restraining influence on the police and which demonstrated the confession to be fundamentally fair (A.213-217, 224-229). There is substantial evidence to support those findings.

The lower courts also held that the purpose in providing the probation officer as a guardian *pro tem* was to protect Monks and have him answer questions, and not to permit the probation officer to serve as petitioner's attorney and prevent the police from learning the truth from the suspect (A.226, 227). If the Juvenile Court had intended that course, it would have denied permission to the police to interrogate petitioner. Instead, it allowed interrogation but only in the presence of the probation officer (A.13, 98, 128, 158).

The role of the probation officer here was to make certain that petitioner was not abused—it was not to counsel him against cooperation with the police, and above all, to permit petitioner to tell the truth if he had in fact committed the offenses then under investigation (A.90). It would have been highly improper for the probation officer to counsel petitioner to deny the offenses even though guil-

ty, or refuse to give any statement. *Miranda* v. *Arizona*, 384 U. S. 436 (1966), dissenting opinion, p. 747 fn.12. See *State in the interest of Carlo*, 48 N. J. 224, at p. 244, 245; 225 A. 2d 110 (1966).

It appeared here that there was an absence of protracted questioning, no relays of teams of detectives (A.92) conducting separate interrogation, no beatings, assaults, threats or show of force, (A.89, 90, 91). There was no loud talk, shouting or other conduct of a frightening nature to break the will or spirit of a suspect—a 15 year old lad. Petitioner has sought to infer misconduct by the police of this nature, but the evidence does not support the inference. Petitioner has argued but not demonstrated these assertions nor shown even a semblance of adolescent fantasy, fright or despair. *cf. In Re Gault, supra.*

The atmosphere during the period of interrogation was calm, quiet and dignified, and without any demonstration of imposition or coercion. Petitioner never appeared tired nor exhausted, and was well-fed and satisfied. It is only now in retrospect that petitioner has magnified his version of the events and labeled them as "coercion". The attack on Jarmolowicz and his failure to prevent the police from interrogating petitioner has a hollow sound because it would have prevented the truth from disclosure and his duty was not to direct the course of interrogation but to serve as an impartial observer.

The probation officer, Jarmolowicz, stated that petitioner at the time he signed the confessions (A.94) was alert, relaxed, bright and articulate (A.99). Above all, petitioner appeared relieved and free from his previous tension after he confessed, as compared with his conduct during the time he maintained his innocence (A.99). Petitioner admitted that he was not mistreated but was only tired

after a day of activity, and only because several hours of what appears as a long day were devoted to questioning because of the breaks for rest, consultation and meals during the day (A.95) and delay in the arrival of the court reporter at night (A.213).

Petitioner has argued that his age was the predominating factor which resulted in his confession despite the presence of Jarmolowicz, the probation officer, who should have but did not protect him from the influence of the police and the overpowering methods used by them in their interrogation. Was it the duty of the probation officer to advise his ward to remain silent and to frustrate the investigation? Respondent does not agree with that contention or function of the probation officer.

We submit that age alone is not that important a factor in the congeries of the totality of the circumstances, because as stated in *Haley* by Mr. Justice Frankfurter in his concurring opinion, "whether a confession of a lad of fifteen is 'voluntary' and as such admissible, or 'coerced' and thus wanting in due process, *is not a matter of mathematical computation*," *Haley, supra,* at page 603.

Petitioner at age 15 was above average and not a dull youngster. The evidence reveals that he was not easily confused when interrogated. He answered responsively and was not bewildered when confronted with his method of operation of purse snatching, and later burying the stolen purses (A. 209, 210), the subject of original inquiry by the police, when he was first taken into custody (A. 209, 210).

Petitioner was alert in his decisions relative to his affairs in response to interrogators, by holding his ground and agreeing to submit to the lie detector tests without fear, after expressing his doubts as to its value in elicit-

ing the truth (A. 128-129). He was hostile and combative at times and showed no fear of the police while in their presence (A. 129-130).

The evidence showed that petitioner was not readily open to suggestions, but was firm and resolute in his denials of complicity when first interrogated. Likewise, he was not prone to taking things at face value and asked questions and hesitated before making answers. Also, he was not inclined to make hasty decisions (A. 57, 18).

At the outset of his interrogation and throughout the entire period until it was terminated, petitioner was not frightened by the show of authority of the police because of his prior involvement with juvenile offenses (A. 199) and because he knew all about the power of police authority and his ability to take refuge in silence (A. 57, 76).

It appears that petitioner was not easily convinced of the extent of knowledge by the police of his complicity when first questioned. He did not yield to admissions until he realized after the confrontation with his friends Ogg and Stopford (A. 94) that the police knew considerably more than he was aware concerning his participation in the offenses because of his prior admissions to them (A. 76). After he recanted, his explanation at the trial that "he made it up" reveals his studied manner of evasion, not typical of a youth, but of a hardened criminal (A. 185-194 inc.).

The evidence showed that petitioner was not excessively trusting but relied on his own judgment and knew that sooner or later he would have to admit the offenses (A. 43) and make a judgment satisfactory to his own conscience entirely free from coercion (A. 165-185 inc.).

After the confessions were signed, the next day petitioner reenacted both offenses in the presence of the

police, without protest or repudiation of his confessions (A. 21, 44-48, 120, 122, 130-134).

Under all the circumstances, it appeared from the evidence that petitioner had an intelligence beyond his mere age, and coupled with the protection afforded him by the presence of Jarmolowicz, all combined to establish that the confessions were not coerced, nor was the will of petitioner overborne nor broken at the time he confessed, but his confessions were his free and voluntary acts as well as his unrestrained choice. Petitioner did not repudiate his confession of the Giambra affair until several weeks later on March 8, 1958 when he conferred with his assigned counsel (A. 205).

Respondent contends that these facts reveal that petitioner was well developed in his intellectual capacity and capabilities, and was not the fragile or frightened youth that he now claims, by his assertion that his will was overborne and the confessions were extracted from him by third-degree methods.

Petitioner was an experienced purse snatcher and armed with a weapon in order to forcibly succeed each attempt upon a victim.

It is evident that the nature of purse snatching coupled with assault of the victim who resists is one of the most serious types of "crime in the streets". It was prevalent in 1956, and it is even more so today. It is an offense usually committed at night when the victim cannot see or identify the assailant, and is unable to apprehend a fleet-footed juvenile. This record vividly portrays this description of the *modus operandi*.

It is for that reason and because the offense is committed in isolated areas that law enforcement officials have long been confronted with this offense as one of the

most serious problems of the cities. It is only after apprehension of one of a gang of juvenile offenders that this particular crime can be solved, and then only by painstaking investigation, interrogation, and ultimate confession. In these offenses, as mentioned, the victim seldom sees the assailant, and cannot readily identify him even after apprehension of suspects.

In our case, the method of operation and the area in which the offenses were committed were the clues which led the police to interrogate petitioner on the unsolved purse snatchings and murder and which pointed the finger at him.

Because of these factors concerning purse snatching at night on lonely streets there is demonstrated the difficulty of local police in their efforts to solve these crimes. It was particularly evident in 1956 when these offenses were committed by petitioner in the particular area in Paterson.

Since *Miranda* was decided on June 13, 1966, the problem of interrogation is different and police technique has been changed to accord with the warnings required by *Miranda*, and in the case of juveniles, as implemented by *In re Gault, supra.*

Despite these changes in police procedure, purse snatching, mugging and assault remain as one of the most serious "Crime in the streets" offenses which have caused consternation at all levels of government and have made the streets unsafe and driven the people into their homes behind closed doors and barricades and has made our city streets a veritable jungle.

Petitioner also claims that he was detained without access to family, friends or counsel for more than 10 days prior to the interrogation of February 26, 1967.

It is undisputed that petitioner was in custody for other similar purse snatching offenses, and was first interrogated for short periods and examined by the polygraph operator concerning those offenses. He was not worn down or pressed into submission by these procedures and had not indicated at first confrontation nor shown to be connected with the Giambra and Weiss assaults. He volunteered these offenses by a "slip of the tongue", when questioned about the others (A.13).

The fact that petitioner was in custody has not been shown to be of such weight or importance that it substantially contributed to his confession of the Giambra offense. As a matter of fact, he was not denied the right to discuss with, nor did he seek access from his parents, because petitioner was not living at home when first placed in custody, and he was not anxious to see them because they had complained to the authorities about his conduct (Tr. 111, 183-185, A.79, 208).

It is now only offered as a basis upon which to support the claim of denial of access by friends or parents as an element of coercion, when in truth and in fact his parents were not sought out by petitioner. He never requested their presence because he knew that his relations with them were strained and he would be chastised rather than helped by them (A.170).

Respondent contends that the fact of prolonged confinement at the Children's Shelter was equivocal and not of the significance which petitioner has placed upon it. It appeared that the only important interrogation took place on February 26, 1957, and even then with many interruptions and most of which was conducted by only one police officer.

Petitioner next claims that he was not warned of his rights and that the denial of these warnings was indica-

tive of the involuntary nature of the confessions. We disagree.

Petitioner was not of a garrulous nature and was courtwise and familiar with the ability to take refuge in silence similar to hardened criminals. He remained silent when he was first interrogated, and answered only when he felt safe with his responses. He made a few voluntary admissions at first but quickly recanted. He agreed to submit to a lie-detector test after stating that he doubted its value in arriving at the truth (A.57, 128-129). The evidence showed that the Police did in fact give petitioner warnings of his right to remain silent (A.22, 28, 38, 71, 95, 97, 154-155). Whether these warnings were adequate was merely a factor among others for the lower courts to consider in the final determination of whether the confession in each instance was voluntary, and which was a fact question under all the circumstances which the Appellate Division resolved in favor of the fundamental fairness of the confession.

Petitioner has argued that the method of interrogation by repeated inquiry, lengthy and continuous questioning on and off, the use of the polygraph, and the psychological effect of the mere presence of the lie detector device, all contributed to the breakdown of the will of petitioner especially because of the subtle form of interrogation by psychological treatment, and which all added up to the ultimate product of the overbearing treatment in obtaining the confessions.

The fact is that there were delays between interrogation, all of which were explained. There were no relays nor continuous questioning to evince or infer conduct to bring about the coerced confession.

Respondent contends that these facts have now been magnified by petitioner out of all proportion to the true

situation, and coupled with the shrill tones of "coercion" are now sought to be applied here in order to describe and berate the skillful and proper police interrogation.

The reality of the police conduct in the light of experience is that these crimes are seldom solved by the police except by skillful interrogation and painstaking investigation (*Culombe* v. *Connecticut*, 367 U. S. 568, 571 (1961) per Frankfurter, J.), and nothing appears to demonstrate that the confessions obtained here were wrung from petitioner. It would have been sheer stupidity and recklessness by the police to pursue coercive tactics such as deception, cajolery or trickery in the presence of probation officer Jarmolowicz, assigned by the Juvenile Court judge to prevent the very acts now argued as involuntary.

The fact is that the presence of the court officer operated as a retraint on the conduct of the Police, and the lower courts found as a fact that Jarmolowicz did in fact protect petitioner from abuse by the police. "Confessions," 37 Harv. L. Rev. 933, 940 (1966). The presence of a third person has long been held to be a protective device in obtaining a confession against a claim of coercion or truthfulness. It is almost a mandate in the case of a juvenile. *Harling* v. *United States*, 295 F. 2d 161, 163 (D. C. Cir. 1961); *State in the interest of Carlo*, 48 N. J. 224, 241, 225 A. 2d 110 (1966).

Petitioner has argued that the interrogation conducted by the police was similar to the questionable and subtle methods propounded by the suggestions set forth in "*Inbau*, Lie Detection and Criminal Interrogation," 110. (2d ed. 1948), especially to a youngster (Petitioner's brief pp. 65, 66, 67), and tantamount to "coercion". It is argued that these methods produced by the combined use of the lie-detector device and the psychological effect

of the interrogation resulted in undue imposition and all of which improperly brought forth the confessions.

These arguments are based on the subjective claims of petitioner rather than the facts revealed by the record and have not been clearly shown to be applicable to this petitioner because on the total record there is a complete absence of extraction of the confession but a voluntary act by him made in the presence of the probation officer designated by the Juvenile Court to be an impartial observer.

Respondent submits that on the overall consideration of the facts, it appears that the confessions given by petitioner in this case are typical of careful, planned, and fair police interrogation which brought them forth and which were proper and permissible.

It is seldom that one questioned before *Miranda* concerning a serious offense immediately and spontaneously admitted his guilt, even when inculpating facts may be weighty against him. An interrogation, no matter how conscientiously conducted, is naturally bound to be a tense occasion and to evoke apprehension, nervousness and a sense of pressure, no matter what the situation, which will be heightened in a person who knows he is guilty by consciousness of guilt and fear of legal penalty. It was always recognized that this is not the kind of normal stress, fear and pressure which can make the questioning unfair and a confession involuntary. In this case, petitioner, although a juvenile, did not appear to be subject to this normal reaction but acted by a reasoned choice after the exercise of his own judgment. *Spano v. New York*, 360 U. S. 315 (1959).

Respondent contends that this argument of tender age and others asserted by petitioner are in substance and

effect an attack on the fact findings of the lower State courts and should be rejected. Our case is not one where the fact findings upholding the validity of the confession by the lower courts are entirely without basis or substance. Likewise, it does not appear that the State courts arbitrarily concluded that the confessions were involuntary and not supported by ample evidence. On the contrary, the confessions found to be valid are based on substantial evidence and should be upheld.

An overall appraisal of a "child offender", as compared with a hardened juvenile criminal in a case involving a statement obtained from a minor was lately described by Mr. Justice Steuer of Appellate Division of New York in a dissenting opinion in the case of *In re D.*, 290 N. Y. Supp. 2d 935 at page 940 (App. Div.-First Dept. 1968) where he stated in a case similar to ours, the following:

> "Turning now to the more serious objection, it is claimed that taking the statement violated due process. And in that respect there is no quarrel on the issue of whether or not Matter of Gault, 387 U. S. 1, 87 S. Ct. 1428, is or is not to be given retroactive effect. What the constitution interdicts is not self-incrimination but involuntary self-incrimination. Unfortunately the tendency to pare away the limits of what is voluntary by successive interpretations of prior interpretations has left this distinction with such a small basis that it is not astonishing that it is either not recognized or passed over lightly with a modicum of lip service. And so it is that while the rule is announced that even in the absence of counsel the confession may be admissible provided the greatest care is taken to assure that it is voluntary (Matter of Gault, supra, at 55, 87 S. Ct. 1428), little by little circumstances

in a particular case which are held to show a lack of voluntary admission are further extended in the next one. In Matter of William L. (29 A. D. 2d 182, 287 N. Y. S. 2d 218), the boy's mother was advised by the police that the matter was not serious and she was discouraged from carrying out her original plan to accompany him. Here she was invited to attend, but this is discounted because the officer described the incident as a stabbing and not a homicide. Many years ago a distinguished jurist warned against just such a *ratio decidendi*, which he called 'a jurisprudence of conceptions' (Roscoe Pound, 'Mechanical Jurisprudence', 8 Col. L. R. 605, 610, quoted by Cardozo, J. in Hynes v. New York C. R. Co., 231 N. Y. 229, 235, 131 N. E. 898, 900, 17 A. L. R. 803). The net result is that while voluntariness is shown by uncontested facts, involuntariness is found by quotations from prior decisions.

"When the fog of interpretive miasma is cleared away and the real question of whether this was a voluntary statement is looked into, there is no doubt at all. A reading of the statement plus the appellant's answers to the qualifying questions, which the majority gratuitously designates as a 'token compliance', explain the situation beyond cavil. Aaron D. was not only willing to explain his adventure, he was anxious to do so. He had been one of a group which killed a man, which fact, per se, made him a tiger in the jungle which his predecessors have made of our streets. He was as eager to have this known as a scholar of like age is to display a Phi Beta Kappa key. District attorneys experienced in such fields repeatedly tell us that this and similar motives (not conscience) prompt

the statements that are so frequently made. (Compare, 'Interrogations', 76 Yale L. J. 1519, 1562-1565 (1967). To say that this statement was not voluntary is to give the word a new and tortured meaning.

"There can be little doubt that the net effect is that the appellant, nauseatingly described as 'this child', will appreciate and react to this disposition by further conduct along the same lines. How else is the staggering increase in serious juvenile crime to be accounted for other than by the knowledge that no felony, however serious, is punishable? The guaranty of due process is a shield to prevent the exaction of forced incriminatory admissions, not a legal excuse for the concealment of crime."

The several arguments made here by petitioner are completely answered in our view by the Appellate Division of New Jersey in describing whether the confessions were coerced or were voluntary, as follows (A.226, 227):

"Defendant's first contention is that his admissions and confessions were obtained in violation of due process and were, therefore, improperly received in evidence.

The record supports the trial court's finding that the police interrogation was fair, was conducted in the presence of a court-appointed officer to insure its fairness and who testified thereto, and was not the product of force, fear or promise of any kind. The questioning was not prolonged at any one time and there were frequent breaks. The initial interrogations were not only brief but pertained primarily to the unrelated purse snatchings

for which defendant had originally been taken into custody.

The statements were taken late in the evening but this was due to defendant's withholding his willingness to give them until after dinner and the delay in getting the stenographer, who did not arrive until 10:30 P.M. The statement concerning the Weiss attack was prepared from 10:45 to 11:30 P.M. From midnight until 1 A.M., the statement concerning the Giambra offense was taken. Defendant then signed both after making a few corrections.

These confessions were made long before *Escobedo* v. *Illinois*, 378 U. S. 478 (1964) and *Miranda* v. *Arizona*, 384 U. S. 436 (1966). Defendant concedes that these cases are not applicable, not being retroactive under *Johnson* v. *New Jersey*, 384 U. S. 719 (1966). We agree with the trial court's finding that they were voluntarily made and were obtained under circumstances fundamentally fair. The court-appointed officer who supervised the interrogation as an officer of the court, was in attendance at all critical moments to insure fundamental fairness and verified that fact.

Defendant cites in support of his position *Haley* v. *Ohio*, 332 U. S. 596 (1948); *Gallegos* v. *Colorado*, 370 U. S. 49 (1962); *State in the Interest of Carlo*, 48 N. J. 224 (1966), and *In re Gault*, 387 U. S. 1 (1967). These cases are factually distinguishable from the instant case. In *Haley*, a confession of murder by a 15-year-old boy was held involuntary because he was questioned by the police, working in relays, hour after hour, with no one at his side to see that the police went so far and no further.

to see that they stopped short of coercion. Such was not the situation here. In *Carlo,* the youths underwent continuous questioning for over ten hours, in the hostile atmosphere of a police station, while repeated efforts on the part of their parents to see them were rebuffed. In a similar way, the other cited cases may be distinguished.

In brief, the decision in each case depends upon the totality of its own circumstances. Here, no physical coercion was employed. Defendant was not subjected to long and gruelling interrogations by relays of police officers. While his parents or an attorney were not present, their presence was not sought and defendant had by his side an experienced probation officer, at the court's direction, to act as his guardian during the questioning. Defendant's versions of the attacks were fully consistent with the physical evidence. His statements were taken by an official court reporter in question and answer form and reproduced verbatim on a typewriter. Thus, there was every effort made to insure an accurate reproduction under fundamentally fair circumstances."

Respondent claims that upon the basis of the application of the totality of circumstances test to the facts of this case, the confessions were voluntary and valid and the action of the Superior Court of New Jersey, Appellate Division, should be affirmed.

The assertion by petitioner that the confessions which were approved by the lower courts "is an incomprehensible regression of the era of the third-degree" is entirely without support in the facts or the law and is a diatribe against the judgment rather than legal argument. (Petitioner's Brief p. 71).

We submit that the argument made under this point by petitioner is lacking in merit and substance and should be rejected.

POINT TWO

The classification of petitioner's commitment on the basis of first degree murder and fixing a life term under N.J.S.A. 2A:113-2 and N.J.S. 2A:113-4 was not based on new findings of fact made in his absence but was based on the evidence at the trial and hence no denial of due process but was a mere declaration of the specific crime committed in order to fix the maximum term under the amended statute, N.J.S.A. 2A:4-37(b).

Under this point, petitioner claims that his "sentence of imprisonment for the maximum term of his life based upon factual determinations made in his absence and without personal notice or hearing deprives him of his liberty without due process of law."

The argument is based upon the fact that at the hearing held in the presence of petitioner's counsel and the prosecutor for the purpose of fixing the maximum term of sentence, the court made a "new finding of fact" that denominated the crime, first degree murder, which was not an issue in his case (A:220-222 inc.). He claims that this issue was not litigated nor adjudicated at the trial.

Respondent disputes this assertion as a fact, and also its interpretation of the statute as a matter of law concerning the purpose of the amended statute which required the hearing called for by the Juvenile Court in order to advise the Superintendent of the Reformatory what crime was committed by petitioner in order to assist

him in fixing his maximum sentence on the records of the correctional institution, N.J.S.A. 2A:4-37(b), because the original commitment found petitioner to be "delinquent." (A.218).

The State charged petitioner at the trial in the *Giambra* case with having stolen her purse after striking her with a blunt instrument and which resulted in the death of the victim (A.3).

Petitioner's defense at the trial was a denial of the charge and, in addition, he claimed an alibi (A.164).

Petitioner did not defend on the basis of diminished responsibility nor other facts to show that the offense charged as a felony murder or murder in the first degree, was of a different degree or offense.

Hence, the issue raised by petitioner and litigated at the trial of the offense charged, if tried as an adult, was first degree murder or not guilty.

It is established that under New Jersey law a homicide committed in the course of the commission or the attempt to commit robbery is denominated as first degree murder, N.J.S.A. 2:113-2, and punishable by death or by recommendation of the jury to life imprisonment. N.J.S.A. 8A:113-4. *State* v. *Sinclair*, 49 N. J. 525, 231 A. 2d 565 (1967), *State* v. *Pacheco*, 38 N. J. 120, 131, 183 A. 2d 54 (1962), N.J.S.A. 2A:113-1.

When the Juvenile Court on December 11, 1957, adjudicated petitioner as delinquent (A.218), it recited in its findings of fact that petitioner was guilty of murder in the Giambra case (A.218).

After the statute was enacted on January 6, 1958 in order to provide for maximum terms of punishment concerning juveniles, N.J.S.A. 2A:4-37(b) and which was an

amendment of the prior act, which provided for indeterminate confinement, the juvenile court was requested by the Reformatory to determine what crime was committed in order to fix the maximum term to be served by petitioner (A.220).

At the hearing held in the presence of all counsel resulting in the letter of May 2, 1958 to the Superintendent of the Reformatory, the evidence at the trial was reviewed, and the Juvenile Court stated that the crime proven at the trial was first degree murder (A.222) and under the facts resulted from a death while in the perpetration of a robbery (A.3, A.220). This offense in New Jersey is punishable by death or life imprisonment upon the recommendation of the jury. N.J.S.A. 2A:113-4.

The direction made was not a "new finding of fact" by the juvenile court when it found the delinquency to be first degree murder but was a declaration in specific terms of the crime charged, tried, and established against petitioner and based on all the evidence litigated and adjudicated at the trial (A.215, A.229).

Petitioner has not shown nor demonstrated in what respect a "new finding of fact" was made as the basis of his sentence to life imprisonment. There was no necessity for additional evidence, nor further opportunity to show facts in mitigation of punishment at the hearing held to determine what crime was committed by petitioner, because at the conclusion of the trial, Judge Spernow found that the "Giambra incident was a brutal murder." (A.215).

The statute as amended in January, 1958, did not provide for designating the commitment of a juvenile for a term of years but was enacted (A.220) to "describe the offense committed for the purpose of fixing the maximum sentence." N.J.S.A. 2A:4-37(b). The Superintendent specifically requested whether the homicide was first degree murder, second degree murder or manslaughter (A.220).

The reason for this hearing was to determine the single question of translating "delinquency" and describing the crime committed and the maximum term in order to alleviate the prior evil where the juvenile was sentenced to an indefinite term for any offense including homicide if committed by an adult. N.J.S.A. 2A:4-37. *State* v. *Smigelski*, 30 N. J. 518, 526-527, 154 A. 2d 1 (1959). *State in re Steenback*, 38 N. J. 89, 99, 167 A. 2d 397 (1961).

Hence, the question of a reduced degree of murder could only be shown at the trial and not at the hearing held to determine the crime committed at the trial, in order to fix the maximum term of sentence on the records of the correctional institution.

If petitioner at the trial had defended on the basis of a mental state which would have reduced the degree of the crime, caused by drunkenness, or other trait, (*State* v. *Sikora*, 44 N. J. 453, 210 A. 2d 293 (1965)), deficiency or condition which would have shown a mental operation of diminished responsibility (*State* v. *DiPaolo*, 34 N. J. 279, 168 A. 2d 401 (1961) cert. denied 368 U. S. 880 (1961)), then, of course, at the hearing held under the amended statute, those facts presented at the trial would have been considered in determining what crime was committed and fixing the maximum term.

But, that was not the issue litigated at the trial because the state showed a first degree felony murder and petitioner defended entirely on a denial, and hence the alternatives at the trial were first degree murder or not guilty. *State* v. *Sinclair*, *supra*, 49 N. J. at page 540.

It would seem that if petitioner attempted to show at the hearing to determine "what crime was committed" in order to assist in fixing his maximum sentence, he would have repudiated his former outright denial of the offense and admitted the crime—a position entirely inconsistent

with his defense at the trial. He had already taken an appeal (A.222) and this change of position would have prejudiced him before the Appellate Courts, including this court where he has relied entirely on his innocence and repudiation of his confession.

This statute involved here is plain and simple. It was intended to provide for specific delineation of all offenses committed by juveniles as well as homicide offenses in order to fix a maximum term of sentence for juveniles, to age 21 as the terminal date, a provision not theretofore provided. *Johnson* v. *State*, 18 N. J. 422 (1955), 114 A. 2d 1 (1955), cert. denied 350 U. S. 942 (1956). In the case of homicides and in order to fix the term, it was necessary to translate "delinquency" in a case as here of a homicide adjudication, to specify the offense as first degree murder, second degree murder or manslaughter, the several degrees of homicide (A.220).

In that respect, if from the facts at the trial the adjudication of delinquency constituted in fact and in law first degree murder, the maximum sentence was life, N.J.S.A. 2:113-4, if second degree murder, the maximum sentence was 30 years, N.J.S.A. 2A:113-4, and if, in fact, manslaughter, the maximum term was ten years. N.J.S.A. 2A:113-5.

Respondent claims that this recital indicates precisely the purpose and spirit of the 1968 amendment of N.J.S.A. 2A:4-37(b) concerning maximum sentences—a feature designed to fix age 21 as the terminal date of confinement of all offenses less than homicide, and life, 30 years and 10 years as the maximum period of confinement of first degree murder, second degree murder and manslaughter, the three homicide offenses under New Jersey law.

This very interpretation was made by the New Jersey Supreme Court in *State in Interest of Carlo*, 48 N. J. 224,

225 A. 2d 110 (1966) and was followed here by this court in *Re: Gault*, 387 U. S. 1, 33 (1967).

The present argument of petitioner which claims that he was subjected to a proceeding which produced a "new finding of fact" in his absence and denied him "due process of law", is based entirely on an assertion which does not relate to post-trial procedures. The case of *Specht* v. *Paterson*, 386 U. S. 605 (1965) is completely inapplicable here and differs completely on the facts.

Petitioner's argument that the issue of first degree murder was not litigated nor adjudicated at the trial in the *Giambra* case is completely unfounded in fact because that was the only issue raised by petitioner by his denial and alibi to the facts which charged first degree felony murder.

The assertion that because the argument is couched in terms of constitutional doctrine, and particularly "due process", has not revealed how and in what respect his rights were invaded because of his absence from the hearing held only to determine what crime was committed, in order to establish his maximum sentence.

Besides, he was not harmed in any manner, and his argument is entirely without basis where as here he was represented by counsel at the hearing and no action was taken which caused any prejudice. On the contrary, he was benefited because he first learned his maximum term and when he becomes eligible for parole a condition he did not know when adjudicated and committed on December 12, 1967 (A.218).

We submit that the argument presented by petitioner under this point is lacking in merit and substance and should be rejected.

Respondent has presented its argument under this point in order to assist the court in the event that it decides to review the question, and has not waived its contention that because this question was not raised nor presented in the state courts, nor set forth on the petition for *certiorari* filed in this court, that it should not be reviewed here.

We disagree with petitioner concerning his claim that the question presented is fairly embraced in the question dealing with the *ex post facto* question considered by the Appellate Division of New Jersey (A. 228, 229). Respondent claims that the questions are distinct and clearly different, and we submit that the several arguments demonstrate and reveal the difference.

In any event, we submit that the question should not be reviewed by this court because of the omission to argue or present the matter in the state courts, as settled by the practice of this court.

CONCLUSION

Respondent submits that the judgment of the Superior Court of New Jersey, Appellate Division here for review, is correct and should be affirmed.

Dated: February 5, 1970.

Respectfully submitted,

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